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**How to Avoid
Getting Trapped
in the Wilderness of
Never-Ending
Government Audits**

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LexMundi
World Ready

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- *Subsequent information should not be understood as, or considered a substitute for, specific legal advice. For inquiries, please contact Madalene A.B. Witterholt or another licensed attorney.



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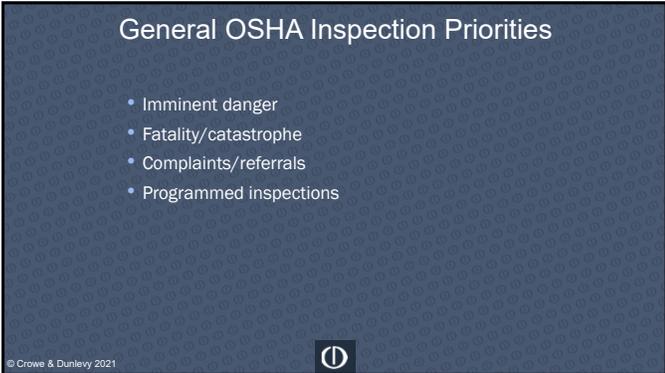


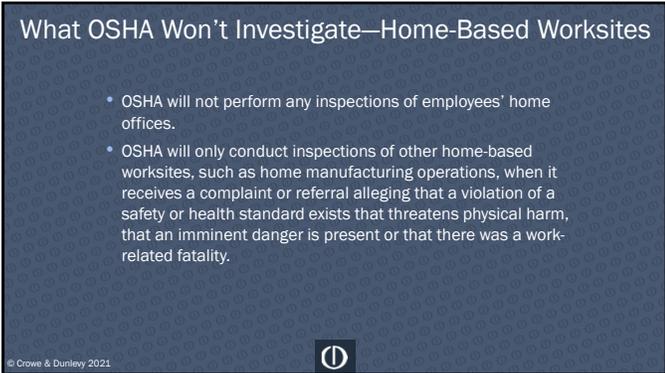
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Types of OSHA Investigations

- **Unprogrammed:**
 - Imminent dangers
 - Fatalities/catastrophes; and
 - Complaints/referrals
- **Programmed Inspections**

Special Emphasis Programs provide for programmed inspections of establishments in industries with potentially high injury or illness rates that are not covered by other programmed inspections.
- National or Local Emphasis Programs (NEPs)
- Site-Specific Targeting (SST) Inspection Programs

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What is the OSHA Inspector, CSHO, supposed to do?

- **Notice of an Inspection**

Section 17(f) of the Act and § 1903.6 contain a general prohibition **against** the giving of advance notice of inspections.
- **Time of Inspection**
 1. Inspections shall be made during regular working hours of the establishment except when special circumstances indicate otherwise.
 2. The inspection shall not be delayed unreasonably to await the arrival of the employer representative. If the employer representative is coming from off-site, the inspection **should not be delayed in excess of one hour.**

Presenting Credentials

While conducting inspections, CSHOs are to present their credentials whenever making contact.

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Employer Refusal to Permit Inspection and or Interference

1. Refusal of Entry or Inspection
2. Employer Interference

If a CSHO is assaulted while attempting to conduct an inspection, then the CSHO shall contact the proper authorities such as the Federal Protective Services or local police and immediately notify the Area Director.

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Employee Responsibilities

1. The Act does not provide for the issuance of citations or the proposal of penalties against employees. Employers are responsible for employee compliance with the standards.
2. In cases where CSHOs determine that employees are systematically refusing to comply with a standard applicable to their own action and conduct, the matter shall be referred to the Area Director.
3. Under no circumstances are CSHOs to become involved in a worksite dispute involving labor management issues or interpretation of collective bargaining agreements. Concerted refusals to comply by employees will not bar the issuance of a citation if the employer has failed to exercise its control to the maximum extent reasonable, including discipline and discharge.

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Opening Conference

1. Attendance at opening conference
CSHOs shall conduct a joint opening conference with employer and employee representatives unless either party objects.
 - Presenting credentials
 - Stating the purpose of the visit
 - Explaining employer and employee rights
 - Scope of the inspection
 - The need for private employee interviews
 - Physical inspection of the workplace and records

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Review of Records

Once a request is made, an employer must provide copies of the required recordkeeping records within four business hours.

The compliance officer is not required to wait until the records are provided before beginning the walkaround portion of the inspection. As soon as the opening conference is completed, the compliance officer is to begin the walkaround.

- Information to be obtained:
- CSHOs shall request copies of the OSHA-300 Logs, the total hours worked and the average number of employees for each year, and a roster of current employees, including a list of each employee's job classification, work hours, and assigned work area(s).
 - CSHOs shall request copies of the OSHA-301 Incident Reports or equivalent forms.
 - CSHOs shall check whether the establishment has an on-site medical, nursing, health, or first aid facility and/or the location of the nearest emergency room where employees can be treated.
 - Show them the MSDS book.
 - Employer safety incentive and disincentive policies and practices can discourage employee reports of injuries and could constitute a violation of section 11(c) of the OSH Act. **BEWARE** of this attitude.

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Walkaround Inspection

- **Who are Walkaround Representatives?**

Persons designated to accompany CSHOs during the walkaround are considered walkaround representatives and will generally include those designated by the employer and employees, Safety Committee or Employees at Large may participate.

- **Does a CSHO sign a release on a walkaround?**

1. CSHOs shall not sign any form or release or agree to any waiver.
2. CSHOs can obtain a pass or sign a visitor's register. Such signature shall not constitute any form of a release or waiver of prosecution for liability under the Act.

- **Disruptive Conduct:**

CSHOs can deny the right of accompaniment to any person whose conduct interferes with a fair and orderly inspection.

The employee representative shall be advised that, during the inspection, matters unrelated to the inspection shall not be discussed with employees.

3. **Classified areas**

In areas containing information classified by an agency of the U.S. government in the interest of national security, only persons authorized to have access to such information can accompany a CSHO on the inspection. See § 1903.8(d).

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Walk Around Inspection

- **The Super Secret Department**

At the commencement of an inspection, the employer may identify areas in the establishment that contain or that might reveal a trade secret. Title 18 USC 1905 provides criminal penalties for Federal employees who disclose such information.

- Trade secret materials shall not be labeled as "Top Secret," "Secret," or "Confidential."

- If the employer objects to the taking of photographs and/or video recordings because trade secrets would or may be disclosed, CSHOs should advise the employer of the protection against such disclosure. If the employer still objects, phone HOME!

- **Photographs and Video Recordings**

Photographs and/or video recordings shall be taken whenever CSHOs determine there is a need.

- **Violations of Other Laws**

If a CSHO observes apparent violations of laws enforced by other government agencies, such cases shall be referred to the appropriate agency.

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A CSHO May...

- Interview non-managerial employees

- A free and open exchange of information between CSHOs and employees is essential to an effective inspection

- CSHOs may question any employee privately during regular working hours or at other reasonable times during the course of an OSHA inspection.

- CSHOs should also obtain information concerning the presence and/or implementation of a safety and health program to prevent or control workplace hazards.

- If an employee refuses to be interviewed, the CSHO shall use professional judgment, in consultation with the Area Director or designee, in determining the need for the employee's statement.

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Time and Location of Interviews

CSHOs are authorized to conduct interviews during regular working hours and at other reasonable times, and in a reasonable manner at the workplace. Interviews often occur during the walkaround but can be conducted at any time during an inspection. If necessary, interviews can be conducted at locations other than the workplace.

- **Conducting Interviews of Non-Managerial Employees in private:**
CSHOs are entitled to question such employees in private regardless of employer preference.
 - CSHOs should identify themselves to the employees by showing their credentials and provide the employee with a business card.
 - CSHOs should explain to employees that the reason for the interview is to gather factual information relevant to a safety and health inspection.
 - Every employee should be asked to provide his or her name, home address and phone number.
 - CSHOs shall inform employees that OSHA has the right to interview them in private and of the protections afforded under Section 11(c) of the Act.

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Time and Location of Interviews

Conducting Interviews of non-managerial employees in private:

- If an employee requests that a union representative be present, CSHOs shall make a reasonable effort to honor the request.
- If an employee requests that his/her personal attorney be present during the interview, CSHOs should honor the request and, before continuing with the interview, consult with the Area Director for guidance.
- An attorney for the employer may claim that individual employees have also authorized the attorney to represent them. Such a situation creates a potential conflict of interest. CSHOs should ask the affected employees whether they have agreed to be represented by the attorney. If the employees indicate that they have, CSHOs should consult with the Area Director, who will contact the RSOL.

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Interview Statements

- Interviews reduced to writing should be written by the CSHO and in the first person language of the individual. Employees shall be encouraged to sign and date their statement. Interpreters are part of the government responsibility.
- Any changes or corrections to the statement shall be initiated by the individual employee. Statements shall not otherwise be changed or altered in any manner.
- Statements shall include the words, "I request that my statement be held confidential to the extent allowed by law" and end with the following: "I have read the above, and it is true to the best of my knowledge."
- If the employee refuses to sign, then the CSHO shall note the refusal on the statement. Try again to read back to the person to try to obtain agreement and then note in the case file.
- A transcription of any recorded statement shall be made when necessary.
- If a management employee requests a copy of the interviewee's statement, one shall be given to them.

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Wage and Hour Pre-Audits and Investigations

- Review employee classifications
 - What are you going to do if your classifications are wrong?
- Review overtime and regular rate of pay calculations
- Review timekeeping records and policies
 - Employee routinely claiming to have worked far more hours than recorded on his/her timesheet.
 - Best practices include having all employees sign off and verify their timesheets each week so they are attesting to the accuracy of the work time.
 - Review leave and time-off policies and be sure you are tracking meal periods and time off from work.
 - Are you catching all **nontraditional** time?
 - No auto-draft time keeping. Do not automatically deduct time for meals or breaks without verifying whether they were actually taken.
 - Employers may round up or down (up to 15 minutes) but must be **consistent**.
 - Develop a formal program for reporting and resolving employee wage concerns.

Why Do a Pre-Audit? The 'Good-Faith' Defense

An employer has a "good-faith" defense if it can prove that:

- It actually believed its pay practices complied with the FLSA
- Its actual belief was reasonable when compared to the beliefs of other employers.
- My lawyer made me do it! Work with legal counsel to properly document the audit and its results.

Why is an Employer Selected for an Investigation?

- Complaints
- The Wage and Hour Division targets low-wage industries
- Regional targeting
- Independent contractors/other hot topics
- Prior bad acts

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The Dress Rehearsal

Put together a spreadsheet that shows:

- Personal information, including employee's name, home address, occupation, sex, and birth date if under 19 years of age
- Start date
- Job title
- Rate of pay by week
- Hour and day when workweek begins
- Total hours worked each workday and each workweek
- Regular hourly pay rate
- Total wages paid each pay period
- Total overtime pay for the workweek
- Deductions from or additions to wages
- Date of payment and pay period covered; and
- FMLA leave notation

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I Fought the Law and Guess What? The Law Won!

- You can refuse to allow the DOL investigator on site without a search warrant.
- Request a period of 72 hours to comply with any investigative demand.
- But why?
- Do you have something to hide?
- Make friends not enemies.
- Have your lawyer run the investigation.

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I Got the Invitation!

Pick up the phone and RSVP! And while you are at it:

- Pick a time that's convenient to you and your witnesses.
- Confirm with the DOL the documents and witnesses it expects for the audit; consider requesting that the scope of the audit be narrowed.
- Review documents covered by the DOL notice; locate supplemental documents to close any gaps, determine other evidence that may be used as potential substitute, and/or identify witnesses to explain any deficiencies.
- Narrow the scope and don't volunteer anything.

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Unannounced Visits

Ask the DOL to return on another day. The DOL must generally give an employer 72 hours to respond to investigative demands.

Regardless of subpoena or consent, the DOL's on-site investigation must be conducted:

- At reasonable times (generally during normal work hours);
- In a reasonable manner; and within reasonable limits.
- The investigator may not interfere with normal business operations.

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Opening Conference or Coffee and Donuts Time?

Your first meet and greet. Make their life easier. They will:

- Describe the intended scope and duration of the inspection; and
- Delivering the DOL's first request for documents and information.
- Negotiate how you are going to produce witnesses.

They will want to see:

- The previous three years of time and payroll records
- Written policies, practices, and procedures
- Pick your documents carefully, number and label as confidential
- Spreadsheets



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The Sip and See

Take your investigator on a tour. Use your best party manners. Your new friend may:

- Give employees his or her business card and advise employees that they may call the DOL at any time
- Conduct "stop and talk" interviews with hourly employees
- Take handwritten notes of practices that may violate the FLSA
- Identify alleged violations and suggest corrective action. (Don't put it off)
- Participate in management interviews

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Party Guests—Employee Interviews

- The Wage and Hour Investigator will conduct employee interviews of managers and hourly employees.
- Demand privacy for hourly employee interviews. This right belongs to the hourly employees, not the DOL.
- Management employees do not have a right to a private interview. You may insist that your counsel or senior management attend and take notes.
- Beware if the employee doesn't speak English.
- Tell employee to request a copy of any signed statement.

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EEOC Investigations

The only difference is they are more specific and they rarely arrive unannounced.

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Your Party Favor

- Be sure your DOL, EEOC notices and surprise investigations are handled by one person
- Do not leave any investigators unchaperoned
- Be prepared
- Less is more

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